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DEPARTMENT OF NATURAL RESOURCES Division of Water Rights

MICHAEL R. STYLER
Executive Director

JERRY D. OLDS
State Engineer/Division Director

November 15, 2006

Mr. Leon Day, PLS, PE,
649 East Main Street
American Fork, UT, 84003

RE: **SEAA 1168** / Devils Pass Water Company - Pond Lining Project

Dear Mr. Day,

This letter is in response to your email concerning the Devils Pass Water Company (DPWC) pond-lining project and the funding proposal with the CUWCD. We want to assure all parties that we had no intention to disrupt DPWC's efforts to obtain financial assistance but sought only to assure that any funds committed and expended – whatever the source – are used with a full knowledge of the issues that may impact the proposed project. By providing a copy of our letter to the DPWC, we believed we would provide the company adequate notice of our concerns and ample opportunity to respond and explain as necessary to give the CUWCD a complete understanding of the proposal before them. We apologize if our intentions were not adequately met by this procedure.

Regarding the comments in your email response to our letter to CUWCD:

First, it appears that we have a consensus and common understanding regarding the winter stockwatering allowed under DPWC's water rights. We acknowledge that DPWC is not asserting any right to storage of water relative to that beneficial use of water and appreciate the company's efforts to exercise that right in an efficient manner.

Second, regarding the so-called "48-hour rule" for sizing of regulating reservoirs, I offer the following comments:

You are correct in your conclusion that no such rule currently exists, either in statute or in administrative code. Nowhere in the comments sent to Mr. Heath was it intended to suggest that the 48-hour flow storage capacity limitation is a "rule," per se. Putting semantics aside, it should be understood that the 48-hour flow storage capacity standard has been historically used as a general guideline to distinguish between what is normally considered reasonable short-term storage required to maintain a constant pressure head for a pressurized irrigation system and a long-term permanent storage proposal that could lead to an enlargement of the underlying water right without an offsetting adjustment to the beneficial use(s) under the right.

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It is generally the responsibility of the Regional Engineer to evaluate any storage proposal and make a recommendation to the State Engineer in determining whether the proposal will require a formal "Application for Permanent Change of Water" (change application). If determined that the reservoir sizing is such that it will qualify as a short-term regulating or overnight reservoir without significant potential for enlargement of the underlying right(s) or impairment of other rights, the State Engineer will typically not require the filing and approval of a change application to allow for storage of water.

In the DPWC case, if 37 AF of water is stored as designed, when compared to the prevailing guideline for storage of 48 hours of the flow which would be allowed under the company's water right, the proposed storage ranges from 2.5 to 10 times the 48-hour delivery under high flow to low flow conditions, respectively.

Given these figures, the Regional Engineer is concerned that the level of consumptive losses that may be incurred by the proposed reservoirs exhibits a potential to enlarge the hydrologic impact of the company's water rights as compared to the historic beneficial use. Such enlargement could result in impairment of the rights of other water users.

Regarding the third issue of a possible future Distribution Order, although DPWC did file change applications pertinent to the underlying rights, the regulating reservoir applications were submitted after that process had been completed and the change applications approved. Therefore, the enlargement/impairment potential of the proposed reservoirs has not received the public and administrative scrutiny provided by the change application process. Until such process can be properly observed – or deemed unnecessary – a Distribution Order may be utilized in an attempt to assure proper delivery and limitation of water under the company's rights. As noted in the "Metering Device Notice" SEAA 1168, issued by the Division on October 3, 2006, certain improvements to the company's facilities are necessary to allow for efficient achievement of this purpose. Upon completion of those improvements, the Distribution Order would direct the Commissioner as to the manner in which the company's decreed water should be measured and limited.

At this point, the DPWC water rights do not contain any explicit provision or allowance to store water. As previously explained, the allowance for regulating reservoirs accommodating 48 hours of the maximum decreed flow is currently viewed as an amount reasonable and necessary for operation of the proposed pressurized irrigation system. Any storage capacity beyond that will likely require the filing and approval of a change application by the State Engineer. In reviewing the documents relative to the DPWC change applications, (a23139 and a23140), there is no evident reference to or discussion of reservoir storage of any kind.

The approval letter from Mr. Richard Hall for DPWC's three small dam applications (65-22-MD/UT21771, 65-23-MD/UT21772, and 65-24-MD/UT21773) states the first condition of approval as: "any storage of water in the reservoir created is subject to all vested water rights." The Division's approval for the regulating reservoirs for a total of 37 AF allows construction of the ponds as designed. However, the approval of those applications does not provide implicit approval of water storage beyond what is reasonable and necessary to achieve the primary and stated purposes of the ponds as regulating reservoirs.

We encourage your proposal to seek practical and effective resolutions of the foregoing issues. DPWC can seek to resolve this matter in several ways:

First, the company could submit data related to the proposed pond configurations (depth, surface area, evaporation and seepage rates, fate of seepage losses, etc.) to demonstrate that the proposed ponds will incur a negligible level of hydrologic depletion. If persuasive data and evidence can be provided, the Regional Engineer may conclude that the proposal can be implemented without the need for a change application addressing the potential for enlargement or impairment.

Second, assuming the small dam approvals remain valid¹, DPWC could proceed to construct the ponds as designed, but with the understanding that DPWC is required to eventually submit proof documentation on its pending change applications a23139 (65-3871) and a23140 (65-2870). Said proof documentation should fully detail the size, location and function of the reservoirs. The proof will be carefully reviewed and, if the sizing and operation of the reservoirs warrants, the Division may require an "Amendatory Change Application" (ACA) from DPWC prior to certification. This approach may allow you to proceed on track with your current project. However, the ACA, if required, would be subject to the usual change application process whereby protests may be received and accounting for consumptive losses would be addressed. Because the ACA would be filed after the completion of construction and no assurances of approval can be given in advance, funds expended to construct the proposed ponds would be at some risk.

Finally, the Company could file one or more new change applications at any time (to replace and supersede a23139 and a23140) seeking to establish DPWC's storage rights *before* the proposed ponds are constructed and lined. The primary advantage of this alternative is that it establishes the levels and limitations of the storage right in advance of construction. However, given the standard processing times for change applications, this approach may disrupt the presently contemplated construction schedule.

In summary, we wish to assure that we have properly advised you of the considerations required of the Division when a water user proposes to construct a storage facility for use in relation to a water right, which previously had no such facility. Such a proposal introduces issues of *enlargement and impairment* that require investigation and resolution. Each such filing requires careful and specific evaluation to determine if the proposed storage has the potential to increase the depletion of water as compared to the historic use and, as a result, deny water to others with valid rights.

Regulating reservoirs are typically considered to provide only a constant pressure head (sometimes debris settlement) and are sized accordingly with minimal or no potential for long-

¹ The small dam applications for the proposed project were approved in 2000, however these approvals may lapse if construction has not started within a reasonable amount of time whereby downstream conditions may have changed enough to warrant reconsideration. The Division's Dam Safety Section is responsible to determine if the approvals have since expired and should be contacted by calling (801) 538-7414 as soon as possible in this regard. They will determine if DPWC should re-file the small dam applications or request an extension of time on the approvals. They should also be notified of the inspector and contractor assignments prior to commencement of construction activity.

term storage beyond that necessary to achieve that primary purpose. If the applicant's intent is to provide permanent, long-term storage, the increased depletion associated with the evaporative losses must generally be accounted for in the evaluation of a properly filed change application whereby the rights can be adjusted (typically by reducing the irrigated acreage) to allow for the reservoir depletions. Such adjustments will typically be reflected in the State Engineer's decision on the application.

If you have further questions, please contact Regional Engineer Kirk Forbush at (435) 896-4429 or me at (801) 538-7430.

Sincerely,

Mike Silva

Mike Silva
Distribution Engineer
Field Services Section

pc:

D. Heath Clark, P.E. / CUWCD Headquarters/ 355 West University Parkway / OREM UT 84058
Kirk Forbush, P.E. / Regional Engineer, Richfield UT
Larry Rawlings / Water Commissioner, MORONI UT 84646
Dave Marble, P.E. / Assistant State Engineer – Dam Safety

File: SEAA 1168

Encl: Print of Email Correspondence received from Mr. Leon Day

Reprint of Email Correspondence received from Leon Day, 11/11/06 at 3:59pm
Subject: Devil's Pass Water Company Regulation Reservoir Permits Correspondence to CUWCD

Mike,

This email is in reference to a letter sent to D. Heath Clark, PE at CUWCD dated November 9, 2006 under your signature.

The letter concerns the application to CUWCD by the Devil's Pass Water Company for the construction of three regulating reservoirs permitted by the State Engineer on July 26, 2000 specifically small dam application permits: 0065-22-MD, 65-23-MD and 0065-24-MD.

The concerns are: Whether Devils Pass Water Company has off-season water storage rights to store stock water flows.

The water company recognizes that there is no storage right associated with the stock water. It was never the intent to store stock water flow during the winter and the water company will not attempt to do this. I don't know where this rumor got started, but it is simply untrue. The company would comply with stopping any diversion of stock water during winter months other than the volume (maybe 8 AF) needed to water livestock. The company has a closed pipeline and other than some small leakage in the pipeline system at the pipe joints no conveyance loss of any water is there. The original 2.5 cfs stock water right decreed to the Sheep Ditch Irrigation Company was needed to overcome the length of almost 7 miles of dirt ditch (conveyance losses). With a totally enclosed and piped delivery system this is no longer the case and the company has no expectation of diverting any more stock water than pipeline losses and actual consumption of animals. I hope this clears up this issue for all concerned.

Another and major concern addressed in your letter is how large can a regulating reservoir be.

This was addressed at the time of the applications (year 2000) to permit the reservoirs. Kirk Forbush raised the issue and stated the 48-hour rule. After going through all the regulations in place at the time I could find no such rule. At this time I have also gone through all I could find online at your website and still can't find any such rule stated either in the State Code or the Administrative Rules addressing dams. It may exist and I just can't locate it. The issue was taken up in a discussion with Richard Hall, head of Dam Safety at the time and responsible for issuing dam permits. Richard explained to me that a former 48-hour rule had been in place in the past, but it was not incorporated into the current regulations. Richard called Kirk Forbush and shortly thereafter Kirk signed off on the applications indicating that the water rights were in order with a comment on each of the applications that "This dam will be OK if the storage is only through the growing season." Devils Pass Water Company accepts this condition and such a condition is part of the conditions of approval stated in the approval letter dated July 27, 2000 for all three dams and signed by Richard B. Hall, Assistant State Engineer.

The final major issue addressed in your letter is that if the dams are built and any significant amount of water stored in them that the company would be in violation of some yet to be issued "detailed distribution order" that would limit any instantaneous storage volume to 48 hours accumulation of the current instantaneous diversion flow right. The implication is that the water company would be issued a violation and fined \$5000 per day for non-compliance. I

went through a Power Point presentation with regard to the new law granting the State Engineer greater enforcement powers. In that presentation it states that such a violation order would include a statement of law and jurisdiction concerning the violation. I'm specifically asking you to provide Devils Pass Water Company a Statement of law and jurisdiction concerning the 48-hour rule for storage volumes in regulating reservoirs. I can't find the rule or law and was told by Richard Hall that there was no such rule in effect at the time. We will be able to save much time and trouble if it can be cleared up whether the dam permits issued for the Devils Pass Water Company would cause a violation of the law and penalties if constructed and filled with water during the irrigation season. Devil's Pass Water Company will comply with whatever the law actually is.

Devil's Pass Water Company has expended a large amount of time and money getting approval for its water project. Money was borrowed from the Board of Water Resources. Everything was gone over in detail including the company's water rights and getting all the permits required including the dams. Pipelines have already been installed to the permitted reservoir sites. Everything that was required was complied with. The construction of the dams has been delayed by the application to the CUWCD for the grants to place liners, which has taken 4 years to get all the way to funding and approval for construction. Your letter certainly would cast a series doubt on the project. Without the reservoirs to supply water to three distinct and different pressure zones for sprinkler irrigation it will become near impossible to manage the company's water rights in any practical way. All the company is trying to do is put its water rights to the best beneficial use possible. Denial of these regulating reservoirs will effectively destroy the project, require the company to waste water without needed regulation volume and leave the company with three pipelines to nowhere and a Board of Water resources loan to repay with greatly diminished practical benefit.

To reiterate, please provide to the Devils Pass Water Company a Statement of law and jurisdiction with regards to the 48-hour rule stated in your letter. Once this issue is cleared up maybe we can proceed in some practical fashion.

It appears that almost everyone has been consulted about these issues except the Devil's Pass Water Company. Since the company is the most interested and affected, knows and recalls in the most detail the history and facts concerning its water rights and pipeline irrigation project, it would have been much appreciated and a matter of utmost courtesy if the water company had been contacted before a letter was sent to the CUWCD that essentially shreds and destroys all our efforts during the past 10 years to complete a water project designed specifically to put the company's water rights to the most beneficial use possible.

Sincerely,

Leon R. Day, PLS, PE
Engineer for and part owner of
Devils Pass Water Company.
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